

1      **First Amended Agreement for the Construction and Operation of Groundwater**  
2      **Replenishment Facilities**  
3      **By and Between**  
4      **East Valley Water District and San Bernardino Valley Municipal Water District**

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6      This First Amended Agreement (Agreement) for the Construction and Operation of  
7      Groundwater Replenishment Facilities is entered into and effective this 6th1st day of  
8      MarchSeptember, 20185 by and between East Valley Water District (“EVWD”) and San  
9      Bernardino Valley Municipal Water District (“**Valley District**”). EVWD and Valley District are  
10     each sometimes referred to herein as a “**Party**” and are collectively referred to as the “**Parties**.  
11     Additional signatories to this Agreement may include the City of San Bernardino Municipal  
12     Water Department. This Agreement shall become effective upon execution by Valley District  
13     and EVWD, regardless of whether the City of San Bernardino Municipal Water Department or  
14     any other additional signatory has executed this Agreement.

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16      Recitals

- 17  
18     A.     The Sustainable Groundwater Management Act of 2014 requires public agencies to  
19     develop plans to ensure the sustainable long-term use of California’s groundwater resources.  
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21     B.     In 2009, the State Water Resources Control Board adopted a Recycled Water Policy that  
22     encourages public agencies to develop groundwater recharge projects using recycled water.  
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24     C.     The Parties believe that through their cooperative work, they can treat and discharge  
25     wastewater in a manner that will maximize the benefits to the Santa Ana River and to the region.  
26     The Parties further believe that such wastewater discharge can be treated to levels that allow the  
27     use of such recycled water for groundwater replenishment or other permissible uses within the  
28     San Bernardino Basin Area, or other adjacent groundwater basins, for the benefit of the Parties  
29     and their ratepayers. Achieving such groundwater objectives requires the construction of a new  
30     wastewater treatment plant.  
31  
32     D.     Using recycled water to replenish the San Bernardino Basin Area, which is the  
33     groundwater basin serving the needs of EVWD and which includes most of the area within  
34     Valley District, improves water supply reliability for EVWD and other retail water agencies  
35     within Valley District’s service area and also provides a drought buffer for those agencies in the  
36     event of a lengthy drought.  
37  
38     E.     The Parties, together with a number of other water agencies, are working together to  
39     develop a collaborative regional plan to increase the use of recycled water for groundwater  
40     replenishment and other purposes. The Parties intend that this project be an integral part of that  
41     regional plan. This Agreement is intended to implement the more general understandings of the  
42     Parties and others as reflected in that regional plan.

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44 F. Replenishing the San Bernardino Basin Area or other groundwater basins with recycled  
45 water is consistent with article X, section 2 of the California Constitution, which requires that the  
46 water resources of California be used to the fullest extent of which they are capable and is also  
47 consistent with Water Code section 13576(k), which authorizes and encourages the use of  
48 recycled water for groundwater replenishment. Groundwater replenishment is also within the  
49 authority of both Parties.

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51 G. The Parties wish to memorialize their agreements relating to constructing and operating a  
52 wastewater treatment plant (the “**Project**”) that will enable them to replenish the groundwater  
53 resources that serve their respective ratepayers.

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### Agreements

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1. *Governance – Joint Management.*

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- a. The Parties agree that they will work together in good faith to complete the construction of the Project no later than June 30, 2018\_.
- b. The Parties will then promptly enter into an agreement for the operation of the Project with a term of at least ten years that will enable the Parties to replenish the San Bernardino Basin Area with at least 6,000 acre-feet of recycled water.
- c. In accomplishing these objectives, the Project will be managed by a Management Committee composed of the General Manager of EVWD and the General Manager of Valley District, or their designees. All decisions shall be made on a unanimous basis.
- d. Both Parties hereby authorize their respective General Managers or designees to develop any administrative and operating rules and procedures that may be needed to implement the terms of this Agreement and that do not require a change in the terms of the Agreement without subsequent action by the Parties’ governing boards.

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2. *Construction of Wastewater Treatment Plant.* The Parties agree that Valley District shall serve as the lead agency for the construction and operation of the Project, as follows:

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- a. *Assignment of Consulting Agreements and Permits by EVWD to Valley District.* Within thirty days of the effective date of this Agreement, EVWD shall assign all existing consulting or other agreements other than legal, as well as any permits, easements or other approvals, relating to the construction of the Project or its subsequent operation to Valley District.

- (1) In the event that Valley District determines, in its sole discretion, that it needs to retain additional consultants in order to fulfill its obligations under the terms of this Agreement, Valley District may retain such consultants without the prior consent of EVWD. Valley District shall, however, provide a copy of such newly retained consultant's budget, scope of work and retainer agreement to EVWD within thirty days of such consultant's retention.

(2) The Parties understand and agree that, throughout the construction and operation of the Project, each Party will continue to be represented by its own regular legal counsel. The Parties will, within thirty days of the execution of this Agreement, enter into a joint defense/common interest doctrine agreement that will enable them to proceed with the Project in the most expeditious manner possible.

*Design-Build and Project Permitting.* Valley District shall design, permit and construct the Project by means of one or more design/build contracts, as authorized by Public Contracts Code sections 22160 *et seq.* Specifically:

(1) *Design Proposal.* Valley District shall work with one or more firms to develop a design/build proposal for review and approval by EVWD no later than April 30, 2016.

(a) The wastewater treatment plant shall be built on APNs 0279-211-33-0000, 0279-211-25-0000, 0279-211-26-0000 and 0279-211-01-0000, which are owned by EVWD. To the extent that additional easements are needed by Valley District or entities acting under Valley District's direction in order to complete the Project, EVWD agrees to issue such easements over its own property or to be responsible for obtaining such easements from neighboring landowners.

(b) EVWD shall review the design/build proposal and approve it (with or without changes) within thirty days of submission. If EVWD fails to approve the proposal in a timely manner, Valley District may, in its sole discretion, deem this Agreement to have been terminated.

(2) *Permitting.* Valley District shall be responsible for obtaining all local, state or federal permits that may be necessary for the construction or operation of the Project in a timely manner.

- (a) Such permits shall include, but are not limited to, NPDES permits, other permits necessary to use recycled water to replenish the San Bernardino Basin Area, and the permits needed to allow for the continued discharge of treated wastewater either to the Santa Ana River or other appropriate discharge points.
  - (b) Valley District shall also be the lead agency for the preparation of one or more environmental document(s) that may be required under the terms of the National Environmental Policy Act and/or the California Environmental Quality Act that are sufficient to support the issuance of the necessary permits for the Project.

(3) *Construction.* Valley District shall cause the Project to be constructed in a timely manner. The Parties anticipate that the Project shall be completed by June 30, 2018. Valley District shall provide monthly updates to EVWD on changes to the plans, specifications, and schedules. Valley District shall not be liable for any delays or additional costs in constructing the Project, save for the gross negligence, intentional acts and willful misconduct of Valley District and its employees, agents and contractors.

(4) *Award of Contract.* Valley District shall obtain the concurrence of EVWD prior to awarding any contract for the construction of the Project. EVWD agrees not to unreasonably delay its approval of any proposed contract.

(5) *Costs.* The Parties agree that the construction of the Project will occur at no cost to Valley District. Valley District shall be entitled to recover all of its costs (including, but not limited to, materials costs; consultants, experts and attorneys' fees; and direct expenditures) from EVWD for the construction of the Project, save for costs directly caused by the gross negligence, intentional acts and willful misconduct of Valley District and its employees, agents and contractors.

(6) *Mark-Up of Costs.* EVWD shall pay all costs incurred by Valley District in connection with the Project without any mark-up, including that EVWD shall pay Valley District's reasonable staff time for work related to the Project.

(7) *Payments Obligatory.* EVWD shall make all payments required by this Agreement as they become due, notwithstanding any individual default by its customers or users, any dispute over charges, or otherwise.

149           c. *Financing.* EVWD agrees that it will finance the full costs of all work associated  
150           with or required by the Project and may make any arrangements that it deems  
151           appropriate for such financing without the consent of Valley District. EVWD  
152           shall keep Valley District reasonably informed as to the status of such financing.  
153           Valley District will cooperate, and may assist in other ways at its discretion, with  
154           EVWD's efforts to secure financing for the Project to the extent that cooperation  
155           is reasonable and necessary.

156        3. *Operation of Wastewater Treatment Plant for Groundwater Replenishment.* The Parties  
157           shall enter into the operations agreement for the wastewater treatment plant and for  
158           groundwater replenishment referred to in paragraph 1 above no later than thirty days  
159           after the completion of the construction of the wastewater treatment plant. Such  
160           operations agreement shall include the following terms:

161        a. *Term*

162           (1) The operations agreement shall be for an initial term of ten years, with  
163           subsequent terms of five years each. Either Party may terminate the  
164           operations agreement with at least one year's written notice prior to the  
165           completion of either the initial term or a subsequent term, but if no such  
166           termination notice is received in a timely manner, the operations  
167           agreement shall automatically renew for another five year period.

168           (2) Notwithstanding the previous subparagraph, if the San Bernardino County  
169           Local Agency Formation Commission activates EVWD's authority to  
170           provide wastewater treatment services to its ratepayers (Activation), this  
171           Agreement shall be deemed terminated in its entirety, effective on the date  
172           of Activation and neither Party to this Agreement shall have any further  
173           obligation hereunder except for those obligations which have accrued as of  
174           the date of Activation. EVWD may succeed to Valley District's  
175           obligations to operate the wastewater treatment plant by providing Valley  
176           District with one year's written notice of such succession.

177        b. *Operation of the Wastewater Treatment Plant.* Valley District shall operate the  
178           wastewater treatment plant, ~~or cause it to be operated by a subcontractor~~, in a  
179           good and workmanlike fashion, in full compliance with all applicable local, state  
180           and federal laws and regulations.

181           (1) EVWD shall arrange, at its sole cost, for the collection and conveyance of  
182           wastewater generated within EVWD's service area to the wastewater  
183           treatment plant.

(2) EVWD shall pay all costs incurred by Valley District for the operation of the wastewater treatment plant (including staff time). Valley District shall invoice EVWD quarterly in arrears and EVWD shall pay Valley District within thirty days of the date of each invoice.

c. *Public Education.* EVWD may construct facilities ancillary to the Project for the purpose of public education and programming on topics including water conservation and replenishment; Valley District will not object to the construction and operation of such public education facilities and the conduct of such programs, *provided that* such facilities and programs are conducted in such a way so as not to interfere with the ongoing operations of the wastewater treatment plant.

197 5. *Facility Ownership.* EVWD shall own, in fee simple, all Project facilities *provided that*  
198 until EVWD completes payment of all construction costs to Valley District, Valley  
199 District shall be deemed to have a security interest in those facilities in an amount equal  
200 to the unpaid debt. In the event of a default in required payment by EVWD, the Parties  
201 agree that Valley District shall have the right to obtain a judgment in the amount of any  
202 default by EVWD and shall further have the right to cause EVWD to increase its water  
203 charges or to levy an assessment to pay the amount of the default.

204 6. *Indemnification*

a. ***Indemnification by Valley District.*** Valley District shall indemnify, defend and hold harmless EVWD, its directors, officers, attorneys, employees and agents from and against all damages, liabilities, claims, actions, demands, costs and expenses (including, but not limited to, costs of investigations, lawsuits and any other proceedings whether in law or in equity, settlement costs, attorneys' fees and costs), and penalties or violations of any kind, which arise out of, result from, or are related to Valley District's performance of its obligations under this Agreement.

b. *Indemnification by EVWD.* EVWD shall indemnify, defend and hold harmless Valley District, its directors, officers, attorneys, employees and agents from and against all damages, liabilities, claims, actions, demands, costs and expenses (including, but not limited to, costs of investigations, lawsuits and any other proceedings whether in law or in equity, settlement costs, attorneys' fees and costs), and penalties or violations of any kind, which arise out of, result from, or are related to the performance of EVWD's obligations under this Agreement.

220           c. *Indemnification Procedures.* Any Party that is an indemnified party (the  
221           **"Indemnified Party"**) that has a claim for indemnification against the other Party  
222           (the **"Indemnifying Party"**) under this Agreement, shall promptly notify the  
223           Indemnifying Party in writing, *provided, however,* that no delay on the part of the  
224           Indemnified Party in notifying the Indemnifying Party shall relieve the  
225           Indemnifying Party from any obligation unless (and then solely to the extent) the  
226           Indemnifying Party is prejudiced. Further, the Indemnified Party shall promptly  
227           notify the Indemnifying Party of the existence of any claim, demand, or other  
228           matter to which the indemnification obligations would apply, and shall give the  
229           Indemnifying Party a reasonable opportunity to defend the same at its own  
230           expense and with counsel of its own selection, *provided* that the Indemnified  
231           Party shall at all times also have the right to fully participate in the disputed  
232           matter at its own expense. If the Indemnifying Party, within a reasonable time  
233           after notice from the Indemnified Party, fails to defend a claim, demand or other  
234           matter to which the indemnification obligations would apply, the Indemnified  
235           Party shall have the right, but not the obligation, to undertake the defense of, and  
236           to compromise or settle (exercising reasonable business judgment), the claim or  
237           other matter, on behalf, or for the account, and at the risk, of the Indemnifying  
238           Party. If the claim is one that cannot by its nature be defended solely by the  
239           Indemnifying Party, then the Indemnified Party shall make available all  
240           information and assistance to the Indemnifying Party that the Indemnifying Party  
241           may reasonably request.

242       7. *Administration of Agreement*

243           a. *Books and Records.* Each Party shall have access to and the right to examine any  
244           of the other Party's pertinent books, documents, papers or other records  
245           (including, without limitation, records contained on electronic media) relating to  
246           the performance of that Party's obligations pursuant to this Agreement or the  
247           Project.

248           (1)     *Retention of Records; Preservation of Privilege.* Each Party shall retain  
249           all such books, documents, papers or other records to facilitate such  
250           review in accordance with that Party's record retention policy. Access to  
251           each Party's books and records shall be during normal business hours  
252           only. Nothing in this paragraph shall be construed to operate as a waiver  
253           of any applicable privileges.

254           (2)     *Outside Auditors.* Any Party may, at any time and at its sole cost, hire an  
255           auditor to examine the accounting for work performed pursuant to this  
256           Agreement. The Parties may also agree to retain an independent auditor to  
257           review the accounting for work performed pursuant to this Agreement.  
258           The costs of such an auditor will be shared equally between the Parties.

- 259           b. *Disputes.* The Parties recognize that there may be disputes regarding the  
260           obligations of the Parties or the interpretation of this Agreement. The Parties  
261           agree that they may attempt to resolve disputes as follows:
- 262           (1) *Statement Describing Alleged Violation or Interruption of Agreement.* A  
263           Party alleging a violation or interruption of this Agreement (the  
264           **“Initiating Party”**) shall provide a written statement describing all facts  
265           that it believes constitute a violation or interruption of this Agreement to  
266           the Party alleged to have violated or interrupted the terms of this  
267           Agreement (the **“Responding Party”**).
- 268           (2) *Response to Statement of Alleged Violation or Interruption.* The  
269           Responding Party shall have sixty days from the date of the written  
270           statement to prepare a written response to the allegation of a violation or  
271           interruption of this Agreement and serve that response on the Initiating  
272           Party or to cure the alleged violation or interruption to the reasonable  
273           satisfaction of the Initiating Party. The Initiating Party and the  
274           Responding Party shall then meet within thirty days of the date of the  
275           response to attempt to resolve the dispute amicably.
- 276           (3) *Mediation of Dispute.* If the Initiating Party and the Responding Party  
277           cannot resolve the dispute within ninety days of the date of the written  
278           response, they shall engage a mediator, experienced in water-related  
279           disputes, to attempt to resolve the dispute. Each Party shall ensure that it  
280           is represented at the mediation by a member of its Board of Directors.  
281           These representatives of the Initiating Party and the Responding Party may  
282           consult with staff and/or technical consultants during the mediation and  
283           such staff and/or technical consultants may be present during the  
284           mediation. The costs of the mediator shall be divided equally between the  
285           Initiating Party and the Responding Party.
- 286           (4) *Prior to Claims Under California Tort Claims Act.* The Parties agree that  
287           the procedure described in this paragraph 7.b represents an effort to  
288           resolve disputes without the need for a formal claim under the California  
289           Tort Claims Act or other applicable law. The period of time for the  
290           presentation of a claim by one Party against another shall be tolled for the  
291           period from the date on which the Initiating Party files a written statement  
292           until the date upon which the mediator renders a decision.
- 293           (5) *Reservation of Rights.* Nothing in this paragraph 7.b shall require a Party  
294           to comply with a decision of the mediator and, after the completion of the  
295           mediation process described above, each Party shall retain and may  
296           exercise at any time all legal and equitable rights and remedies it may

297 have to enforce the terms of this Agreement; provided, that prior to  
298 commencing litigation, a Party shall provide at least five calendar days'  
299 written notice of its intent to sue to the other Party.

300 8. *General Provisions.*

- 301 a. *Authority.* Each signatory of this Agreement represents that s/he is authorized to  
302 execute this Agreement on behalf of the Party for which s/he signs. Each Party  
303 represents that it has legal authority to enter into this Agreement, to perform all  
304 obligations under this Agreement and that any and all appropriate Board action  
305 necessary for approval of this Agreement has been taken. .
- 306 b. *Amendment.* This Agreement may be amended or modified only by a written  
307 instrument executed by each of the Parties to this Agreement.
- 308 c. *Jurisdiction and Venue.* This Agreement shall be governed by and construed in  
309 accordance with the laws of the State of California, except for its conflicts of law  
310 rules. Any suit, action, or proceeding brought under the scope of this Agreement  
311 shall be brought and maintained to the extent allowed by law in the County of San  
312 Bernardino, California.
- 313 d. *Headings.* The paragraph headings used in this Agreement are intended for  
314 convenience only and shall not be used in interpreting this Agreement or in  
315 determining any of the rights or obligations of the Parties to this Agreement.
- 316 e. *Construction and Interpretation.* This Agreement has been arrived at through  
317 negotiations and each Party has had a full and fair opportunity to revise the terms  
318 of this Agreement. As a result, the normal rule of construction that any  
319 ambiguities are to be resolved against the drafting Party shall not apply in the  
320 construction or interpretation of this Agreement.
- 321 f. *Entire Agreement.* This Agreement constitutes the entire agreement of the Parties  
322 with respect to the subject matter of this Agreement and, save as expressly  
323 provided in this Agreement, supersedes any prior oral or written agreement,  
324 understanding, or representation relating to the subject matter of this Agreement.
- 325 g. *Partial Invalidity.* If, after the date of execution of this Agreement, any provision  
326 of this Agreement is held to be illegal, invalid, or unenforceable under present or  
327 future laws effective during the term of this Agreement, such provision shall be  
328 fully severable. However, in lieu thereof, there shall be added a provision as  
329 similar in terms to such illegal, invalid or unenforceable provision as may be  
330 possible and be legal, valid and enforceable.

- 331                   h. *Successors and Assigns.* This Agreement shall be binding on and inure to the  
332                   benefit of the successors and assigns of the respective Parties to this Agreement.  
333                   No Party may assign its interests in or obligations under this Agreement without  
334                   the written consent of the other Parties, which consent shall not be unreasonably  
335                   withheld or delayed.
- 336                   i. *Waivers.* Waiver of any breach or default hereunder shall not constitute a  
337                   continuing waiver or a waiver of any subsequent breach either of the same or of  
338                   another provision of this Agreement and forbearance to enforce one or more of  
339                   the rights or remedies provided in this Agreement shall not be deemed to be a  
340                   waiver of that right or remedy.
- 341                   j. *Attorneys' Fees and Costs.* The prevailing Party in any litigation or other action  
342                   to enforce or interpret this Agreement shall be entitled to reasonable attorneys'  
343                   fees, expert witnesses' fees, costs of suit, and other and necessary disbursements  
344                   in addition to any other relief deemed appropriate by a court of competent  
345                   jurisdiction.
- 346                   k. *Necessary Actions.* Each Party agrees to execute and deliver additional  
347                   documents and instruments and to take any additional actions as may be  
348                   reasonably required to carry out the purposes of this Agreement.
- 349                   l. *Compliance with Law.* In performing their respective obligations under this  
350                   Agreement, the Parties shall comply with and conform to all applicable laws,  
351                   rules, regulations and ordinances.
- 352                   m. *Third Party Beneficiaries.* This Agreement shall not create any right or interest in  
353                   any non-Party or in any member of the public as a third party beneficiary.
- 354                   n. *Counterparts.* This Agreement may be executed in one or more counterparts,  
355                   each of which shall be deemed to be an original, but all of which together shall  
356                   constitute but one and the same instrument.
- 357                   o. *Notices.* All notices, requests, demands or other communications required or  
358                   permitted under this Agreement shall be in writing unless provided otherwise in  
359                   this Agreement and shall be deemed to have been duly given and received on: (i)  
360                   the date of service if served personally or served by facsimile transmission on the  
361                   Party to whom notice is to be given at the address(es) provided below, (ii) on the  
362                   first day after mailing, if mailed by Federal Express, U.S. Express Mail, or other  
363                   similar overnight courier service, postage prepaid, and addressed as provided  
364                   below, or (iii) on the third day after mailing if mailed to the Party to whom notice  
365                   is to be given by first class mail, registered or certified, postage prepaid,  
366                   addressed as follows:

Agreement for Groundwater Replenishment  
EVWD/Valley District  
September 2015  
Page 11 of 13

368 *Notice to San Bernardino Valley Municipal Water District*

369  
370                   Douglas Headrick, General Manager  
371                   SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT  
372                   380 East Vanderbilt Way, San Bernardino, CA 92408  
373                   Phone: (909) 820-3701  
374                   Email: [douglash@sbvmwd.com](mailto:douglash@sbvmwd.com)

375 David R.E. Aladjem  
376 DOWNEY BRAND LLP  
377 621 Capitol Mall, Sacramento, CA 95814  
378 Phone: (916) 520-5361  
379 Email: [daladjem@downeybrand.com](mailto:daladjem@downeybrand.com)

380 *Notice to East Valley Water District*

381 John Mura, General Manager/CEO  
382 EAST VALLEY WATER DISTRICT  
383 31111 Greenspot Rd., Highland, CA 92346  
384 Phone: 909-889-9501  
385 Email: [john@eastvalley.org](mailto:john@eastvalley.org)

386                   Jean Cihigoyen etche  
387                   CIHIGOYENETCHE GROSSBERG & CLOUSE  
388                   8038 Haven Avenue, Suite E, Rancho Cucamonga, CA 91730  
389                   Phone: (909) 483-1850  
390                   Email: [jean@cgclaw.com](mailto:jean@cgclaw.com)

SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT

393  
394  
395 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
396 **Mark Bulot Susan Longville**  
397 President, Board of Directors  
398  
399

400 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
401 Gil Navarro, Steve Copelan, Secretary

403 APPROVED AS TO FORM

404  
405 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
406 David R.E. Aladjem, Esq.  
407 Downey Brand, LLP  
408 Counsel for **San Bernardino Valley Municipal Water District**  
409  
410

411 **EAST VALLEY WATER DISTRICT**

412  
413 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
414 **James Morales, Jr.**Chris Carrillo  
415 Chairman of the Board  
416  
417  
418 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
419 John Mura, General Manager/CEO  
420

421 APPROVED AS TO FORM

422  
423 By: \_\_\_\_\_ Dated: \_\_\_\_\_  
424 Jean Cihigoyenetche  
425 **Cihigoyenetche Grossberg & Clouse**The JC Law Firm  
426 Counsel for **East Valley Water District**